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Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*

Chair-Rapporteur: Luis **Gallegos**

* The annexes to the present report are circulated as received, in the language of submission only.

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I. Introduction

1. The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established by the Human Rights Council in its resolution 26/9 of 26 June 2014 and mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights.

2. The working group's fourth session, which took place from 15 to 19 October 2018, opened with a statement from the United Nations Deputy High Commissioner for Human Rights. She congratulated the Chair-Rapporteur on the release of the draft legally binding instrument and the draft optional protocol, noting that those drafts marked a key milestone and provided a welcome basis for the start of substantive negotiations. The instrument should focus on the needs of people affected by business-related human rights abuses and take into account the differential impact that such abuses had on different groups of rights holders. Noting that there was no inherent conflict between the Guiding Principles on Business and Human Rights and the development of a legally binding instrument, she stressed that the treaty process should build on the progress made with the Guiding Principles and relevant initiatives aimed at improving access to remedy for victims of corporate abuses, such as the Accountability and Remedy Project of the Office of the United Nations High Commissioner for Human Rights (OHCHR). She noted the shared goal and aspirations among those present to end corporate abuse, expressed deep appreciation for the civil society organizations driving the process forward and recalled the aims of the process. Finally, she invited all stakeholders to engage constructively and work collaboratively during the session.

II. Organization of the session

A. Election of the Chair-Rapporteur

3. The Permanent Representative of Ecuador, Luis Gallegos, was elected Chair-Rapporteur by acclamation following his nomination, on behalf of the Group of Latin American and Caribbean States, by the delegation of Mexico.

B. Attendance

4. The list of participants, the list of panellists and the summary of statements by panellists are contained in annexes I, II and III, respectively.

C. Documentation

5. The working group had before it the following documents:

(a) Human Rights Council resolution 26/9;

(b) The provisional agenda of the working group (A/HRC/WG.16/4/1);

(c) Other documents, including the Chair-Rapporteur's zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, the Chair-Rapporteur's zero draft optional protocol to the draft instrument and a programme of work, all of which were made available to the working group on its website.[1]

[1] See www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx.

D. Adoption of the agenda and programme of work

6. In his opening statement, the Chair-Rapporteur said that the draft instrument was the result of years of joint efforts. Its core aims are the protection against business-related human rights abuse, the elimination of impunity and access to justice for victims. The draft was based on discussions held during the working group's first three sessions, as well as several consultations and more than 100 bilateral meetings held in 2018 with multiple stakeholders. He referred to legal gaps and noted that the obstacles faced by victims of business-related human rights abuse with respect to access to remedy had been clearly identified and could be addressed only by the adoption of a legally binding instrument. The current draft could and should be improved; thus, the Chair-Rapporteur wished for States to contribute constructively during the session.

7. The Chair-Rapporteur presented the draft programme of work and invited comments. As there were no comments by States, the programme of work was adopted.

III. Opening statements

A. Keynote speech

8. The keynote speaker, the Member of the French National Assembly, Dominique Potier, said that a new dawn for globalization, which should be based on the recognition of rights for all, was approaching. He called for a shift in the discourse, away from the idolization of markets and towards respect for human rights. The struggle for human dignity and the survival of the planet were part of the same battle. Drawing on the French experience in the field of business and human rights, he referred to three lessons that could inform the working group's discussions. The first was the need to work in alignment with the Guiding Principles and avoid redefining parameters. Second, the discussion should be grounded in a realistic vision that could prompt international and national engagement. Third, defining the scope of companies to be regulated could be challenging; France had found success in a gradual approach. Prevention was key to any successful arrangement.

B. General statements

9. Delegations congratulated the Chair-Rapporteur on his election, with many expressing their full support for his leadership.[2] Many delegations also thanked the Chair delegation for the release of the draft legally binding instrument and the draft optional protocol in advance of the session, noting that the production of those documents represented a significant step in the process of the working group. Furthermore, several delegations recognized the importance of civil society as a driving force behind the process.

10. Several delegations and many non-governmental organizations (NGOs) reminded the working group of the multiple reasons for further developments in the field of business and human rights. General issues were raised, such as the unfair power imbalance between companies and rights holders, the growing power of companies vis-à-vis States, the increased scope of the rights granted to companies on the international stage without corresponding obligations and the lack of effective regulation in conflict and post-conflict settings. Specific types of abuse were also mentioned, such as the negligent exposure of children to toxic chemicals and the displacement and murder of indigenous peoples. Many delegations and NGOs saw those issues as evidence of gaps in the international legal order that had been brought on by globalization and should be filled with a legally binding instrument.

[2] Copies of the oral statements made by States and observer organizations during the fourth session that were shared with the secretariat are available at www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx. A webcast of the entire session is available at http://webtv.un.org/.

11. Some delegations and observer organizations referred to regional and international standards and initiatives relevant to business and human rights, stressing the importance of building upon the work that had already been undertaken. Reference was made to International Labour Organization conventions, the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD), European Union regulations and directives, and the work of OHCHR (its Accountability and Remedy Project in particular) and the Working Group on the issue of human rights and transnational corporations and other business enterprises. Some delegations and organizations affirmed the importance of the Guiding Principles and emphasized that the draft instrument must build on and borrow from them. Although several delegations recognized the influence of the Guiding Principles on the draft instrument, others pointed out the lack of any explicit reference to them in the draft. Two business organizations explained that they did not support the draft instrument or the draft protocol for many reasons; in their view, the drafts undermined and diverged from the accepted approach taken in the Guiding Principles.

12. The majority of the discussion centred on the draft instrument itself. Many delegations considered the draft to be a good starting point for negotiations and a major improvement on the elements document that had been the basis for discussions at the working group's third session. The recognition in the draft that the primary responsibility to promote, respect, protect and fulfil human rights and fundamental freedoms lay with States was especially welcome. While many delegations noted approvingly that the draft imposed obligations on States only, some delegations asked whether that was actually the case. One delegation pointed out, for instance, that, throughout the draft, there were references to human rights "violations" committed in the context of business activities and insisted that the word "violations" referred to breaches of obligations. In its view, it would be more accurate to refer to human rights "abuses" if the direct obligations of companies were not being discussed in the draft. Another delegation and several NGOs considered it unproblematic to impose direct obligations on companies under international law and expressed the hope that the future instrument would establish such obligations.

13. There were some calls by delegations and observer organizations for more clarity and precision in the language of the draft, given its legal nature. The articles covering the scope, definitions, jurisdiction, applicable law, rights of victims, legal liability and international cooperation were specifically mentioned in that regard. A regional organization reserved its position on the draft. It stated that the added value of any possible legally binding instrument should be to enhance the protection of and respect for human rights and ensure a level playing field for companies globally. The organization noted that it was reflecting on what type of legally binding instrument would stand the best chance of achieving that level playing field. Some delegations also reserved their position on the draft as a whole, arguing that it risked jeopardizing the ongoing efforts to ensure that the Guiding Principles were followed. One delegation noted that many provisions in the draft merely restated general obligations and principles of international law. It suggested that those provisions could be removed to avoid unnecessary duplication.

14. Specific provisions of the draft were also addressed during the general discussion. Many delegations and organizations commented on the scope of the instrument, that is, the companies to be covered under it. They argued that the scope was too narrow, because only companies with transnational activities were to be regulated. It was noted that the structure or nature of a company was irrelevant to victims, who should be entitled to access to remedy regardless of the kind of company committing the abuse. In addition, many transnational corporations owned or had relationships with strictly domestic companies, making it difficult to differentiate between transnational and national companies in practice. It was thus suggested that all companies be covered by the future instrument (although some argued that resolution 26/9 restricted the scope to transnational corporations alone). Some delegations and observers also expressed concern about the limitation of the draft's scope to companies involved in for-profit economic activity, as that limitation, they argued, would exclude from the scope many companies responsible for documented abuses, such as State-owned enterprises. Two delegations suggested that developing countries be given special consideration, and that State-owned enterprises, as well as micro-businesses and small businesses in those countries, be subject to more lenient treatment.

15. Some delegations requested more clarity with respect to the rights to be covered by the instrument. They noted that "all international human rights and those rights recognized under domestic law", could vary from State to State, since States ratified different human rights treaties and had different domestic laws. There was a question as to whether such differences would cause implementation issues.

16. Delegations and NGOs expressed their appreciation for the article on jurisdiction since, in their view, the use of extraterritorial jurisdiction by home States was crucial to ensuring that companies could not avoid accountability. However, other delegations voiced concern over the use of extraterritorial jurisdiction.

17. Many delegations and organizations welcomed the focus on prevention, with several NGOs stressing the importance of mandating due diligence activities.

18. Divergent views were expressed with respect to the article on legal liability. Although some delegations and organizations argued that the provision made in the draft instrument for criminal, civil or administrative liability was crucial for victims, other delegations questioned whether it was appropriate to discuss the criminal liability of legal entities, as such liability was not provided for in their jurisdictions. Concern was also raised about the provision authorizing universal jurisdiction.

19. Differing views were also discussed with respect to the relationship between the future instrument and trade and investment agreements. At least one delegation and several organizations stressed the importance of affirming the primacy of human rights over such agreements. However, some delegations were concerned that such an affirmation would prioritize one branch of international law over another and could restrict States' negotiating positions. With respect to investment more generally, delegations noted the importance of sustainable development and argued that a legally binding instrument would not have a negative effect on investment; rather, it would create a level playing field and ensure that investment occurred in a context in which human rights standards were respected. In that regard, several delegations mentioned the 2030 Agenda for Sustainable Development and pointed out that the Sustainable Development Goals recognized the positive role that could be played by business.

20. Many NGOs and a network of national human rights institutions suggested additions to the draft. In their view, the instrument could more clearly refer to the role and protection of human rights defenders and other at-risk populations. Specific reference was made to indigenous peoples and the importance of free, prior and informed consent. Calls were also made for the greater structural integration of a gender perspective.

21. Delegations thanked the Chair for his intersessional consultations and for leading an inclusive, transparent process of elaborating the draft. However, a regional organization expressed the view that the Chair had not addressed its concerns. It regretted that most of its proposals had not been taken into account, including (a) a suggestion to revert to the Human Rights Council to adopt a new resolution, which could have reaffirmed the mandate for the elaboration of a legally binding instrument; (b) a request that a footnote be added to the programme of work to clarify that the working group could discuss all business enterprises; and (c) a proposal to invite the former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, to deliver a keynote speech at the opening of the session.

22. Some delegations noted that the treaty process was not anti-business and that business should have a greater voice in it, whereas other delegations called for the process to be protected from the commercial and vested interests of the business sector. A business organization requested that the business community be consulted more fully, noting that there had been a lack of meaningful discussion with its members on important substantive issues. Several NGOs disagreed that business should be given a greater voice and warned against corporate capture of the process.

23. In addition, delegations and organizations pointed to the need for broader State participation in the process. They noted the risks involved with any instrument that enjoyed only partial support and argued that any legally binding instrument would need traction

among many States to be effective. Many NGOs called on States and a regional organization to engage more proactively in the future.

24. Many delegations pledged to engage constructively in the working group's fourth session and expressed their hopes for an open, frank and productive dialogue.

C. General introduction to the draft legally binding instrument

25. The Chair-Rapporteur, explaining the background to the elaboration of the draft, said that the text of the draft had been informed by the voices of thousands of victims, discussions at many bilateral and multilateral meetings and the input of experts of different backgrounds. Following the distribution of the draft instrument on 20 July 2018, the Chair-Rapporteur had received a number of comments from States, civil society, lawyers, academics and other experts.

26. The draft drew heavily on basic principles of international law and human rights and rested on four pillars.

27. The first, and primary, pillar was prevention. It incorporated elements of the Guiding Principles, drew on experiences from national, regional and international systems and took into account discussions held in earlier sessions of the working group.

28. Victims' rights, access to justice in particular, were the second pillar. The emphasis was on the removal of practical obstacles faced by victims in their pursuit of redress. Inspiration had been taken from working group discussions and regional regulations concerning jurisdiction.

29. International cooperation was the third pillar. The transnational nature of contemporary practices and the need for States to work together to ensure that justice was done were recognized in that pillar.

30. Monitoring mechanisms, which were discussed in the draft instrument and, more prominently, in the draft protocol, were the focus of the fourth pillar. Inspiration had been drawn from other human rights treaties.

31. While the draft instrument was based on four pillars, all of its parts were interrelated, and it should be read as a whole.

IV. First reading of the draft legally binding instrument[3]

32. During each session of the first reading of the draft instrument, the Chair-Rapporteur introduced the relevant article(s). Following his introduction, panellists provided expert views, and there was a general debate (see annex III for a record of the comments made by the panellists).

A. Articles 2 and 8

33. The Chair-Rapporteur noted that the primary objectives of the draft instrument were set forth in article 2 (1) (b), which focused on human beings as victims of business-related harm and their effective access to justice and remedy. Article 8, which sought to ensure that many practical obstacles to justice were eliminated, also focused on the rights of victims.

34. Delegations and organizations welcomed the inclusion of articles 2 and 8 and voiced their opinion that articles setting out the purposes of the instrument and the rights of victims were crucial. However, many argued that those provisions would need more precision and clarity, particularly if the instrument was to be applied in national courts. Some delegations also noted that it would be more appropriate if the references to "victims" in both articles

[3] The present section should be read in conjunction with the draft instrument, available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

(and elsewhere in the document) were changed to "alleged victims", so as to ensure impartiality.

35. With respect to article 2, delegations debated the appropriate scope of the instrument, in particular with regard to the multiple references to "business activities of transnational character". Several delegations and organizations reaffirmed their positions that the future instrument should apply to all companies without distinction, including national and State-owned companies. Others contested that view, arguing that transnational corporations escaped regulation, and therefore should be the focus of the instrument. One delegation suggested that the matter could be resolved by focusing on the transnational nature of the activity rather than the nature of the business. Some delegations and many NGOs argued that the future instrument should establish direct obligations for transnational corporations and that the establishment of such obligations should be reflected in the instrument's statement of purpose.

36. Several delegations called for greater precision in the wording of article 2. At least one delegation expressed the view that the provision in which human rights violations "in the context of" business activities were referred to was too vague for courts to apply. There was some concern about the use of the word "violations" in article 2 (1) (b), as some delegations and a business organization said that the term "abuses" – or "violations and abuses" – was more appropriate. It was also unclear what rights were covered in that provision. While several delegations welcomed the reference to international cooperation in 2 (1) (c), they wondered whether the draft was too comprehensive and suggested stating that one purpose of the instrument was to further international cooperation in matters relating to business activities.

37. Some delegations also suggested adding more to article 2 by including specific references to the Guiding Principles; the universal, indivisible, interdependent and interrelated nature of human rights; and the aims of bolstering domestic systems outlining international standards. Some NGOs requested an explicit reference to the primacy of human rights over trade and investment agreements.

38. While many delegations and NGOs signalled their appreciation of article 8 and its focus on victims, several delegations suggested abridging the article since much of it reiterated accepted norms of international law, and one suggested removing it altogether. In addition to calls to remove particular provisions (specifically article 8 (9–13)), there were calls to use language that was more accurate and more typical of a legal instrument.

39. With respect to article 8 (1), some delegations asked for more clarity regarding the definition of terms (e.g., "satisfaction") and the entities that would be subject to the obligations in the article. Several delegations and a business organization voiced concern about the reference to "environmental remediation and ecological restoration" in article 8 (1) (b), noting that the terms were undefined, beyond the scope of the Guiding Principles and not within the remit of the working group.

40. Concern was also expressed about article 8 (2), since it could be read as authorizing extraterritorial jurisdiction (any discussion of which, in the view of those expressing concern, should be confined to article 5). One delegation requested that references to claims of groups be removed, as class actions were not permitted in the legal system of the State on behalf of which the representative of the delegation was speaking.

41. The representatives of two delegations criticized article 8 (3) for being too general and going beyond the intended scope of the future instrument.

42. Several NGOs stressed the importance of keeping article 8 (4), as it would have practical benefits for victims.

43. At least one delegation voiced concern about the vague terminology used in article 8 (5) (c), asking, in particular, what constituted "unnecessary" formalities, costs or delays. In its view, such vague terminology would lead to inconsistent application from one State to another and could render the provision meaningless. Two delegations raised strong objections to the clause in article 8 (5) (d) that provided that "in no case" would victims be required to reimburse the legal expenses of other parties to a claim. In their view, cost shifting was sometimes reasonable and necessary to prevent frivolous lawsuits; thus, unjustified

claims should be excluded from the provision. In the same vein, some delegations mentioned the importance of including language to ensure protection from vexatious litigation. Such language could be included in article 8 (5) (d) or elsewhere (in article 8 (6) or a new, stand-alone provision, for instance).

44. Much discussion centred on the potential establishment of an international fund for victims (art. 8 (7)). Several delegations welcomed the idea in principle, with many seeking greater clarity as to the modalities of the fund, its funding and management. Several were also of the view that the establishment of the fund merited a separate article. However, other delegations, concerned that States might be expected to pay for the harm caused by companies, expressed reservations.

45. Two delegations also voiced concern about the potentially broad scope of articles 8 (8) and 8 (9). Those articles, they said, should be brought into closer alignment with existing international law and relevant cases.

46. In addition, several delegations and NGOs requested numerous additions to article 8 – for instance, a more pronounced gender perspective, protections for human rights defenders and the inclusion of groups as victims. One delegation also suggested that the differing capacities of States be taken into account, particularly in articles 8 (5) and (6).

B. Articles 6, 7 and 13

47. Noting that short statutes of limitation often hampered victims' ability to bring claims, the Chair-Rapporteur stressed the importance of including article 6 in the future instrument. He discussed how article 7 acknowledged that human rights standards could vary across jurisdictions and emphasized that victims should be given the option to decide which human rights standards applied. The aim of article 13 was to harmonize the interpretation of, and ensure the consistency of the treaty with, international law.

48. Delegations had differing views of article 6. Some expressed support for an article regarding statutes of limitation, although at least one suggested that the article be removed, and many others pointed out issues with the text. With respect to the first sentence of article 6 (1), many delegations and a business organization sought clarification of the meaning of "crimes under international law". In the absence of an agreed-upon and exhaustive definition of the concept, there could be implementation issues, as States would have divergent views. Several delegations expressed the view that if "crimes under international law" meant the core crimes covered in the Rome Statute of the International Criminal Court (namely, genocide, crimes against humanity, war crimes and the crime of aggression), international law was already clear that no statutes of limitation applied, so it would be unnecessary to state that statutes of limitations would not apply to crimes under international law in the future instrument. It was also not clear to all whether the phrase also covered crimes having an international character, such as piracy, trafficking and terrorism. Some delegations suggested addressing issues involving the definition of terms by focusing on gross human rights violations or all international human rights violations instead of crimes under international law.

49. Some delegations and an NGO expressed concern about the vague language in the second sentence of article 6 (1), in particular the references to "unduly restrictive" and "adequate period of time". In their view, the provision would need to be clearer for it to be effective. One delegation suggested using the words "unnecessarily restrictive" rather than "unduly restrictive". Two delegations raised the issue of variations in domestic law regarding statutes of limitation, with one insisting that the instrument should not interfere with national law in that regard.

50. There was a range of views regarding article 7. Some delegations and NGOs viewed the article as crucial, arguing that it should be expanded to include references to competent regional courts and indigenous peoples' laws and customs. Other delegations supported the article but requested more precise language. Also requested was a clarification of what was meant by "competent" courts and "involved persons". There were calls to ensure that the article was consistent with existing standards of private international law. In that respect, one

State suggested consulting the International Law Commission. Several delegations expressed concern about the formulation of article 7 (2), while some others expressed unease with the idea that their courts could be burdened with trying to decipher foreign laws, potentially in different languages and coming from foreign cultures, with respect to complex issues. A few delegations noted that permitting flexibility in choice of law rules could be acceptable in some civil lawsuits but would be unacceptable in criminal cases. They requested that the text thus be amended to remove criminal cases from its ambit. One delegation considered that the provision would create too much uncertainty, and suggested that it be removed.

51. Some States and many organizations insisted that article 13 (6) and (7) be strengthened and explicitly state that human rights enjoyed primacy over trade and investment agreements. One delegation suggested that those provisions take into account ongoing efforts to revise such agreements, and some NGOs said that the provisions should require that human rights impact assessments and consultations be conducted prior to entering such agreements. Two delegations, however, warned that going too far could undermine development. In addition, several delegations reserved their position on those provisions and expressed concern that the provisions could create an unacceptable hierarchy in international law, potentially violating customary international law. One delegation cautioned that there should be careful consideration of the language used as it could have an impact on many States' large networks of agreements.

52. In the context of that discussion, reference was made to article 13 (3), since some delegations and NGOs considered there to be a conflict between it and the provisions in article 13 (6) and (7). Several NGOs suggested deleting article 13 (3), or at least the first sentence thereof.

53. One delegation signalled its approval of the reference to State sovereignty and territorial integrity in article 13 (1), while another expressed concern that States could attempt to rely on the reference to avoid assisting with international cooperation. One delegation asked as to why only some of the principles of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations had been cited. The delegation suggested that reference be made to all or none of them, so as not to give the impression of favouring some over others.

C. Article 9

54. The Chair-Rapporteur opened the debate on article 9 by mentioning the texts that had been consulted in drafting the article. Chief among them were the Guiding Principles, guidelines of the International Labour Organization, European Union rules on non-financial reporting, national legislation such as the French law on the corporate duty of vigilance and general comments of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

55. Many States and observer organizations welcomed the inclusion of an article focused on prevention and noted that it was one of the key articles of the draft. Of those, many agreed with a panellist that it would be more appropriate to refer to "human rights due diligence" throughout the article rather than due diligence alone. Similarly, there were several calls to align the provision more closely with the letter and spirit of the Guiding Principles and to build upon them where necessary. In that regard, some delegations and a business organization took issue with what they perceived to be an approach that focused on outcomes rather than conduct. In addition, multiple delegations reiterated their call for the instrument to cover all companies, both national and transnational. While several delegations and NGOs called for more precision in the text of the article, some States criticized it for attempting to prescribe too much. In their view, the article would be more effective if it outlined general standards and left it to each State to determine how best to implement them. Several NGOs insisted that the article impose direct obligations on transnational corporations; however, some delegations voiced concern that there was a risk that the article could lead to the inappropriate transfer of some obligations from the State to business. At least one delegation called for the article to give consideration to the need for States to develop and warned against overburdening certain companies.

56. There were several suggestions for other considerations to be reflected in the text. For instance, some delegations requested greater recognition of the varying capacities of States. Other delegations suggested including provisions addressing situations of conflict and the need for enhanced due diligence therein. Several NGOs referred to the need for an independent monitoring body, suggested including explicit references to global supply chains, insisted on a greater recognition of gender issues and structural inequalities and made several proposals for other forms of prevention that go beyond human rights due diligence, such as increased access to information, protection of human rights defenders and the provision of injunctive relief.

57. With respect to article 9 (1), many NGOs voiced approval of mandating due diligence by companies. One delegation was of the view that the text should be expanded to refer to the indirect effects of business activities and suggested that the provision mention the impact resulting from "or associated with" such activities. A business organization, on the other hand, criticized the provision for being too broad and expressed particular concern about the provision's reference to "all persons".

58. Most of the discussion centred on article 9 (2) and its many provisions. There were many calls for this provision's greater alignment with the concepts and terminology of the Guiding Principles (as well as the OECD guidelines, and guidance on due diligence). Some delegations and organizations specifically noted that some of the stages of human rights due diligence referred to in the Guiding Principles were missing from or had been altered in the draft and that new elements had been added. In their view, the stages of the Guiding Principles should be strictly followed, with new elements added only where necessary. Some delegations suggested making clearer references to the different ways companies could be responsible for adverse human rights impacts.

59. One delegation suggested that, in article 9 (2) (c), "Prevent human rights violations" be changed to "Seeking to prevent human rights violations". Another delegation requested that article 9 (2) (d) include reporting on financial matters, in addition to reporting on non-financial matters. Some NGOs called for the inclusion of gender impact assessments in article 9 (2) (e).

60. A few delegations took issue with article 9 (2) (f). They stated that the term "all contractual relationships" was too broad given the many different types of commercial contracts States entered into, and requested that the provision be made more precise or removed from the text.

61. Article 9 (2) (g) was welcomed by some delegations and many NGOs. It was noted that "meaningful consultations" was nonetheless too restrictive and vague. There was thus a call to remove the word "meaningful" and to elaborate on the types of consultations needed. Some delegations and many NGOs suggested including a specific reference to free, prior and informed consent (and the notion of continuous consent) in this provision. In addition, some NGOs requested that a stronger gender perspective be included. While there were also some calls for adding to the categories of peoples at heightened risk (in particular lesbian, gay, bisexual, transgender and intersex persons and persons with chronic diseases), one delegation suggested removing specific references to any group, as including some groups could be interpreted as excluding others.

62. Some delegations sought more clarity with respect to what was expected in article 9 (2) (h). One delegation and a business organization suggested removing article 9 (4) due to its lack of clarity (and taking into account their concerns about other parts of article 9).

63. Some delegations supported article 9 (5) as written, with one pointing out the need for developing countries to rely on small and medium-sized enterprises. Two delegations recognized the risk of overburdening such enterprises but voiced their opinion that they should not be exempted. Several other delegations and a business organization criticized the ambiguity of the provision, noting that there was no accepted definition of "small and medium-sized undertakings", that no standards for authorizing exemptions had been put forth and that it was unclear what "selected obligations" such undertakings would be exempted from. It was argued that the provision left far too much discretion to States and would weaken the article. The instrument, in their view, should apply to all companies without distinction. For those reasons, they argued for the removal of that provision.

D. Articles 10, 11 and 12

64. With respect to article 10, the Chair-Rapporteur noted that the working group's previous discussions had highlighted the need for the draft to include reference to legal liability, in particular civil, criminal and administrative liability. The draft sought to balance prescription and flexibility, thus allowing States the freedom to determine how best to implement the article. The provisions on civil liability focused on broadly accepted principles, while those on criminal liability allowed States to apply effective non-criminal sanctions in order to garner broader acceptance by States. Articles 11 and 12 on mutual legal assistance and international cooperation were devoted to filling jurisdictional gaps; the Chair-Rapporteur expressed hope that they would help in realizing the implementation of the future instrument.

65. Several delegations and NGOs welcomed the inclusion of article 10, on legal liability, with many NGOs expressing appreciation that it covered civil, criminal and administrative liability. Although some were of the view that appropriate distinctions between natural and legal persons had been made in the draft, a few delegations suggested that the distinction be made clearer in several provisions of the article. Many NGOs requested that the article refer directly to the obligations of transnational corporations. There were also calls for the article to more clearly address aspects of corporate law, in particular separate legal personality and fiduciary duties. Most NGOs requested clearer provisions on piercing the corporate veil, whereas one business organization found that the current draft already disregarded separate legal personality and unfairly subjected companies that could have very tenuous connections to abuses to legal risks. Several delegations and an NGO asked for provisions focusing on situations of conflict. One delegation suggested adding references to international humanitarian law throughout the article, while another suggested including language on liability for aiding and abetting, particularly in situations of occupation.

66. Two delegations sought clarification with respect to article 10 (3), with one asking whether States would be expected to bear financial responsibility for the acts of private parties.

67. States were divided on article 10 (4) on the reversal of the burden of proof. Some delegations and a business organization considered the provision to be too broad, noting that it could lead to due process violations and other violations of defendants' rights. Other delegations found that the provision would be problematic if it did not clearly exclude criminal cases, as reversing the burden of proof in such cases would run counter to the presumption of innocence. Several delegations and NGOs welcomed the inclusion of the provision. State delegations expressed appreciation for the inclusion of the condition that the reversal of the burden of proof was to be subject to domestic law, but many NGOs insisted that the condition be removed and that the reversal of the burden of proof be mandated by the instrument.

68. There were many calls for clarity and increased precision in article 10 (6). State delegations specifically asked what was meant by "control" in article 10 (6) (a) (one delegation suggested changing the wording to "sufficient control") and the words "sufficiently close relation" and "strong and direct connection" in article 10 (6) (b). That ambiguity was noted by the representatives of an NGO and a business organization, both of whom argued that, as written, the provisions could subject companies to unreasonable legal risk through their business relationships, regardless of their control over events or relationship to the harm. One delegation nonetheless suggested expanding the article to cover harm indirectly related to companies, and several NGOs suggested including more references to supply chains and piercing the corporate veil.

69. Some delegations raised serious concerns about article 10 (8), as they interpreted it to require the imposition of criminal liability on legal entities, which was not a possibility in their legal systems. One delegation said that the references to dissuasive non-criminal sanctions as an alternative in articles 10 (10) and 10 (12) did not resolve the issue and that the State it represented would be unable to accede to any instrument that made corporate criminal liability an obligation. Some delegations welcomed the provision and suggested making it even stronger – for instance, by lowering the threshold of "intentional" acts to

something easier to prove in practice. There were also calls for clarification as to what crimes were being referred to in the provision. An NGO cautioned that the principle of legality could be violated if the crimes were not defined with sufficient clarity.

70. Many delegations voiced concern about the inclusion of universal jurisdiction in article 10 (11). There were several requests for clarity as to the scope of the crimes covered by the provision. It was pointed out that universal jurisdiction was a very controversial subject with no common agreement, and that it had been abused by some States in the past; thus, in their view, it was better to remove any reference to it. Other delegations acknowledged those concerns and suggested deferring to other processes or experts on the matter (such as the General Assembly's Sixth Committee or the International Law Commission). One delegation asked why the provision appeared in article 10 rather than article 5, which was on jurisdiction.

71. In general, delegations seemed to approve of articles 11 and 12, considering them to have a foundation in existing international law and to be important for the future instrument. Some delegations, however, expressed concern about article 11, in particular its obligatory nature, its lack of sufficient regard for the difficulties developing countries might have in implementing it and the imbalance regarding procedural rights for defendants. One State suggested incorporating a dual-criminality component in some provisions to ensure that the article would not be abused. With respect to article 12, some delegations suggested including references to the Charter of the United Nations and the Guiding Principles, addressing cross-border issues more explicitly and allowing transnational corporations and other business enterprises to join international cooperation efforts.

E. Articles 3 and 4

72. The Chair-Rapporteur said that the previous working group discussions had informed the wording of articles 3 and 4. In article 3, a broad approach, in which reference was made to all human rights recognized internationally and domestically, had been chosen, to account for disparities among legal systems. The draft had also retained, and strengthened, the approach adopted in the third session – namely, the focus on "activities of a transnational character". That term, defined in article 4, includes, notably, activities undertaken by electronic means. In the same article, the term "victims" is defined in broad terms so as to include the immediate family or dependants of the direct victim.

73. Although delegations indicated that articles 3 and 4 were necessary, there were divergent views as to what they should consist of. With respect to article 3 (1), many States and organizations insisted that the instrument cover all business enterprises, regardless of whether they engaged in transnational activities, noting that such an approach would be consistent with the Guiding Principles. In their view, what was important was the seriousness of the human rights impact, not the type of activity or nature of the company. Some delegations called for the instrument to cover only transnational corporations. Several other delegations were of the view that the approach taken in the draft, in which the focus was on the transnational character of business activities, was a fair compromise that was consistent with the footnote to resolution 26/9 and should satisfy those who wanted the instrument to cover more than just transnational companies. Yet other delegations disagreed, arguing that such an approach was vague and potentially too broad. In addition to the issue of scope, some delegations and organizations reasserted their position that it was inappropriate to refer to "violations" when referencing business activity. It was suggested that the draft should refer instead to "abuses" or "adverse human rights impacts".

74. Many delegations and some organizations sought clarity regarding the meaning of the words "all international human rights and those rights recognized under domestic law", which appeared in article 3 (2). Some delegations were of the view that such a formulation could be understood to impose obligations on States that they had not consented to and that States could thus be averse to signing the future instrument. Those delegations suggested moving that language to the preamble or changing the text to read "all treaties adopted by States". Other delegations considered the formulation in the draft to be too broad and open to differing interpretations, thus potentially causing implementation problems. It was

suggested that the instrument use the terminology of principle 12 of the Guiding Principles, which referred to internationally recognized human rights. In addition, some delegations suggested expanding the wording of article 3 (2) to cover international humanitarian law or human rights and fundamental freedoms. Some NGOs made suggestions about which rights to include, such as environmental rights, gender equality, the right to self-determination and the collective rights of indigenous peoples.

75. Many delegations requested more precision for the definition of victims contained in article 4 (1). Some were of the view that the definition was too broad, and there was concern that it could be abused by people who did not even need to establish a link to a company's harmful activities. At least one delegation and one NGO noted that the list of harms was not entirely clear, and others asked why the impairment of a person's human rights needed to be "substantial" before he or she could be considered a victim. Another delegation and an NGO challenged the use of the term "victim" in general and suggested that it would be more appropriate to refer to "person" or "rights holder". Some delegations and NGOs suggested including references to particular groups, such as peoples or communities, vulnerable populations and human rights defenders.

76. Although the comments on article 3 (1) were applicable to article 4 (2), arguments specifically regarding the latter article were also made. Some delegations and NGOs questioned the provision of article 4 (2) under which business activities of a transnational character were understood to mean for-profit activities alone. That qualification, in their view, unnecessarily narrowed the scope of the instrument and exempted certain companies that were responsible for human rights abuses. There were also calls for explicit references to parent companies and/or global supply chains, as well as transnational corporations and other business enterprises.

F. Article 5

77. The Chair-Rapporteur opened the panel discussion by clarifying that the goal of article 5 was to allow victims to choose the forum where their legal cases should be heard. In the working group's previous discussion, having such a choice had been identified as key to ensuring effective access to justice. The sources that had been drawn on to draft the article had included European Union regulations, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities of the Committee on Economic, Social and Cultural Rights and general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights of the Committee on the Rights of the Child.

78. Several delegations and many NGOs stressed the importance of including an article on jurisdiction and noted that transnational corporations and other business enterprises often escaped accountability by taking advantage of differing rules among States regarding jurisdiction. Thus, they expressed the hope that the instrument could address such gaps and provide some uniformity in that area. There were several calls for clearer provisions in article 5 and internal consistency with other parts of the draft (articles 7 and 10 in particular). An NGO asked whether article 5 addressed civil jurisdiction alone and requested clarification of the draft's approach to criminal jurisdiction.

79. Delegations expressed their support for article 5 (1) (a), as it reaffirmed jurisdiction on the basis of territoriality. There was greater discussion surrounding article 5 (1) (b), since it could permit the exercise of extraterritorial jurisdiction. A business organization argued that the exercise of such jurisdiction threatened States' sovereignty and would divert attention from the need to strengthen access to remedy in the jurisdictions where harms occurred. Some delegations raised similar concerns, noting that States had abused extraterritorial jurisdiction in the past, and requested that the exercise of extraterritorial jurisdiction be appropriately limited. Many NGOs disregarded those concerns and argued that the basis for jurisdiction in article 5 (1) (b) was accepted in international law – States had the right to regulate the actions of their nationals abroad. Calls to include additional bases of jurisdiction in article 5 (1) were also made. Two delegations suggested permitting courts to assert jurisdiction when the victim

was a national or domiciliary of the forum State. An NGO suggested referring to universal jurisdiction.

80. Some delegations voiced concern about article 5 (2) (subparagraphs (c) and (d) in particular), as they considered it too broad. There were several calls to refine the language, with one delegation suggesting looking to private international law for clarity regarding the concept of "domicile". While there were no concerns expressed about subparagraphs (a) and (b), several delegations and some organizations found subparagraph (c) problematic, as there was no accepted definition of "substantial business interest". There was similar unease with subparagraph (d). In particular, clarity was sought with respect to the meaning of "instrumentality" and "or the like". It was suggested that those provisions be deleted or revised. Some delegations and NGOs nonetheless requested that article 5 (2) (d) be strengthened to more clearly address issues relating to corporate structures and separate legal personality. They insisted that the article permit jurisdiction over parent companies and other entities with established commercial relationships with the entity causing harm.

81. Although one delegation suggested deleting article 5 (3) (in its view, the provision covered a procedural issue governed by national law), other delegations welcomed it. Several delegations took issue with the clause permitting actions to be taken on behalf of victims without their consent, if justified. In their view, such a provision could be subject to abuse, and it would be inappropriate to bring claims without people's consent. The Chair-Rapporteur said that their consent would be unnecessary only in exceptional circumstances, such as where serious violations made the presence of a victim impossible. One panellist insisted that the clause be retained, as it was necessary for effectuating class action suits (for which there could be elaborate procedural systems ensuring that people could opt out if they did not want to be part of an action). The delegation of one State suggested removing references to actions brought by groups of individuals, since its legal system did not permit class actions.

82. There were calls to address additional issues in article 5. Some delegations and many NGOs insisted that *forum non conveniens* be prohibited. Several NGOs also suggested including a provision on *forum necessitatis*. One delegation requested that special attention be paid to situations of conflict. Several delegations said that the article or the draft should address the issue of conflict of jurisdictions. They expressed concern about the consequences of the broad approach to jurisdiction taken in article 5, in particular relating to forum shopping and parallel proceedings. Neither article 5 nor article 7 provided rules for the resolution of disputes between competing jurisdictions. One delegation proposed that the court first seized of a matter should have priority over it. A panellist agreed that the issue should be addressed but warned that the proposed solution could be subject to abuse.

G. Articles 1, 14 and 15

83. The Chair-Rapporteur noted that article 1, the preamble, was based on the major instruments and principles of international human rights law. He emphasized some of its paragraphs. Article 14 was derived from provisions of the major human rights treaties. Article 15 contained certain final provisions, particularly those of a procedural nature.

84. Much of the discussion centred on the preamble. Several delegations and some observer organizations suggested taking the preamble out of the operative part of the text. There were also several calls to make the text more precise. One delegation suggested revising the wording of the second preambular clause to read "in case of harm decisive for the enjoyment of their human rights". Several delegations suggested adding a reference to international humanitarian law in the third and eighth preambular clauses, whereas another proposed deleting the reference to "international human rights law", since it was subsumed under "international law". One delegation argued that the third preambular clause added little to the text and should be deleted. Another delegation welcomed the formulation in the fourth preambular clause that stated "or otherwise under their jurisdiction or control". A delegation and a business organization suggested changing the word "shall" in the sixth preambular clause to "should" to bring it more closely into line with the Guiding Principles. However, another delegation and several NGOs preferred the text as it was and insisted that there be

more references to the direct obligations of transnational corporations and other business enterprises in the preamble. Some delegations that were of the view that only transnational corporations should be covered by the instrument called for the removal of the reference to "all" business enterprises. A business organization asked whether it was consistent to include the reference to all business enterprises when the rest of the draft referred to businesses with activities of a transnational character. A delegation and an NGO suggested adding more principles to the list of principles in the seventh preambular clause; however, another delegation asked whether including some principles could be seen as favouring some over others, while another delegation suggested referring to principles of international law generally rather than listing specific ones. In addition, there was a call to delete the ninth preambular clause, which referred to Council resolution 26/9.

85. There were many suggestions for additions to the preamble. For example, several delegations recommended making reference to the principles and purposes of the Charter of the United Nations (one delegation suggested referring to the Charter as a whole). There were also several calls for references to the importance of sustainable development and the positive role that companies could play. Some delegations and many NGOs suggested including stronger language with respect to gender. Many NGOs also requested references to the primacy of human rights. There were calls by delegations for a number of other references, including to fundamental rights and freedoms, the Guiding Principles and the right to a sustainable environment.

86. Some delegations and NGOs welcomed the provision, in article 14, for the establishment of a committee, and suggested numerous powers that it should have, in particular the ability to receive and review complaints and make binding decisions. Other delegations expressed concern about the rush to create a new committee. It was suggested that the working group consider the ongoing review of the treaty body strengthening process. To reduce the risk of fragmentation and duplication of effort, some delegations suggested relying on existing mechanisms for the implementation and interpretation of the future instrument. Those delegations also raised the issue of the funding implications of establishing a new body. Another delegation stated that it was premature to discuss the establishment of a committee before reaching a stronger consensus on the substance of the draft instrument. Some NGOs argued that the article should go further and establish more powerful international bodies, such as a court or monitoring centre.

87. With respect to specific provisions under article 14, some delegations called for the inclusion of a clause prohibiting conflicts of interest in 14 (b). Other delegations said that parties to the instrument should have five years to meet the reporting requirements established in article 14 (2), instead of four. It was also suggested that article 14 (4) (e) be removed or revised to provide for the conduct of studies by the committee itself.

88. There was general approval of article 15, although one delegation suggested that the first six paragraphs, on implementation, should form a separate article. Another delegation considered article 15 (1) to be redundant and argued that States should be allowed to determine how to fulfil their treaty obligations. Some delegations called for greater consideration of the capacities of developing States and said that including article 15 (2), in addition to the reporting requirements under article 14 (2), was unnecessary. Some delegations and many NGOs welcomed the inclusion of article 15 (3), considering it important to retain it in the instrument and potentially replicate it in article 9, the preamble or both. However, it was argued that the rights of all interested parties should be considered, and one delegation voiced concern that the provision could cause businesses to oppose the human rights agenda. Another delegation suggested either deleting the provisions contained in article 15 (4–6) or moving them to the preamble. However, some delegations and NGOs requested that article 15 (4) be strengthened, in particular the references to gender-based and sexual violence, which, in their view, deserved a stand-alone provision. Similarly, some delegations and NGOs approved of article 15 (5) and requested its replication in other parts of the draft. One delegation warned against another's proposal to add groups to the list of groups facing heightened risks of violations of human rights, as including one group could be read as excluding another. A delegation and an NGO recommended that article 15 (10) and (11) and the references to regional international organizations be removed. Some delegations requested the working group to decide upon a reasonable number of ratifications

to be required under article 15 (12) regarding entry into force. One delegation also agreed with a panellist that a provision should be added to cover dispute resolution between States regarding the interpretation and application of the instrument.

V. Presentation of the draft optional protocol

89. The Chair-Rapporteur, introducing the draft optional protocol, said that the text had been inspired by previous working group discussions, the views of experts and instruments such as the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It was to be a living document, subject to future developments and (potentially) future protocols. The protocol focused on access to justice for victims and provided for the ability to bring complaints at both the national and international levels. For that purpose, the provisions on the committee proposed in the draft instrument would be supplemented by the strengthening or establishment of national implementation mechanisms, which would have numerous competencies, such as the ability to receive complaints, recommend measures, propose legislative reforms and collaborate with and help bolster national institutions.

VI. Panel: “The voices of victims”

90. Several participants mentioned instances of business-related abuses, particularly in relation to indigenous peoples, conflict-affected areas and human rights defenders. Several delegations and NGOs agreed with the panellists that the plight of victims needed to be addressed and that victims’ rights to access to justice and effective remedy should be ensured. Some delegations shared domestic laws and initiatives that could help the working group address those issues. A regional organization discussed its own set of regulations and directives, which included strong provisions for the access of victims to justice and remedies. All victims, it was noted, should enjoy the same rights and protections, but any legally binding instrument should also include provisions for groups of persons often disproportionately affected by abuses related to business activities, such as women, persons with disabilities, children, indigenous peoples and ethnic or religious minorities. Some NGOs said that it would be beneficial to address the needs of some disproportionately affected groups more effectively in the draft instrument. It was also advocated that the instrument as a whole should have a stronger gender perspective. A regional organization and several delegations noted that human rights defenders faced specific risks and that any form of retaliation against those who spoke out against abuse was completely unacceptable. It was suggested that States should generally increase protections in that respect, and that the instrument should include greater protections for human rights defenders. Several resources were cited, including the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, reports of the Special Rapporteur on the situation of human rights defenders, European Union laws and examples from national action plans on business and human rights.

VII. Recommendations of the Chair-Rapporteur and conclusions of the working group

A. Recommendations of the Chair-Rapporteur

91. **Following the discussions held during the fourth session, and acknowledging the different views and suggestions on the draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises expressed therein, the Chair-Rapporteur makes the following recommendations:**

(a) **That the Chair-Rapporteur invite States and other relevant stakeholders to submit their comments and proposals on the draft legally binding instrument no later than the end of February 2019;**

(b) **That the Chair-Rapporteur prepare a revised draft legally binding instrument on the basis of the discussions held during the fourth session of the working group, of the addendum to the present report containing a compilation of oral statements from States,[4] of the submissions referred to in subparagraph (a) and of the informal consultations to be held, and present the revised text no later than the end of June 2019, for consideration and further discussion;**

(c) **That the Chair-Rapporteur direct substantive intergovernmental negotiations on the draft legally binding instrument during the working group's fifth session, to be held in 2019, on the basis of the revised draft referred to in subparagraph (b), in order to fulfil the mandate of Human Rights Council resolution 26/9;**

(d) **That the Chair-Rapporteur present a second briefing on the draft optional protocol, as an annex to the draft legally binding instrument, during the working group's fifth session;**

(e) **That the Chair-Rapporteur hold informal consultations with Governments, regional groups, intergovernmental organizations, United Nations mechanisms, civil society and other relevant stakeholders before the working group meets for its fifth session;**

(f) **That the Chair-Rapporteur prepare an updated programme of work on the basis of the discussions held during the fourth session of the working group and of the informal consultations and make available that programme before the fifth session of the working group for consideration and further discussion during the session.**

B. Conclusions of the working group

92. **At the final meeting of its fourth session, on 19 October 2018, the working group adopted the following conclusions, in accordance with its mandate established by resolution 26/9:**

(a) **The working group welcomed the opening message of the United Nations Deputy High Commissioner for Human Rights, Kate Gilmore, and thanked the Member of the French National Assembly, Dominique Potier, for serving as keynote speaker. It also thanked a number of independent experts and representatives who took part in the first reading of the draft legally binding instrument and took note of the proposals, comments, suggestions and questions received from Governments, regional and political groups, intergovernmental organizations, civil society, NGOs and all other relevant stakeholders on substantive as well as procedural issues related to the draft instrument;**

(b) **The working group acknowledged the dialogue focused on the content of the draft legally binding instrument, as well as the participation and engagement of Governments, regional groups, civil society, experts, intergovernmental organizations and relevant stakeholders, and took note of the input they had provided;**

(c) **The working group noted the shared concern about the victims of abuses caused by transnational corporations and other business enterprises and the serious challenges faced by such victims, especially those in the most vulnerable situations, and the need to respect, promote, protect and fulfil their human rights;**

(d) **The working group took note with appreciation the recommendations of the Chair-Rapporteur and looked forward to the revised draft legally binding**

[4] To be prepared by the secretariat by no later than the end of December 2018 and issued under the symbol A/HRC/40/48/Add.1.

instrument, the informal consultations, and the updated programme of work for its fifth session.

VIII. Adoption of the report[5]

93. **At its 10th meeting, on 19 October 2018, after an exchange of views on the report and its contents, the working group adopted *ad referendum* the draft report on its fourth session and decided to entrust the Chair-Rapporteur with its finalization and submission to the Council for consideration at its fortieth session.**

[5] Upon request of the representative of the European Union, it is noted that the regional organization disassociated itself from the conclusions of the working group reached at its fourth session.

Annex I

List of participants

States Members of the United Nations

Afghanistan, Albania, Algeria, Angola, Argentina, Austria, Azerbaijan, Bahrain, Belgium, Bolivia (Plurinational State of), Brazil, Cameroon, Chile, China, Colombia, Congo, Costa Rica, Cote d'Ivoire, Cuba, Czechia, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Jordan, Kuwait, Lao People's Democratic Republic, Lebanon, Lesotho, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Moldova, Romania, Russian Federation, Rwanda, Saudi Arabia, Senegal, Slovenia, Sri Lanka, South Africa, Spain, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela (Bolivarian Republic of), Zimbabwe.

Non-member States represented by an observer

Holy See, State of Palestine.

United Nations funds, programmes, specialized agencies and related organizations

World Health Organization Framework Convention on Tobacco Control (WHO FCTC).

Intergovernmental organizations

European Union, International Chamber of Commerce, International Organisation of La Francophonie (IOF), International Labour Organisation (ILO), Organisation for Economic Cooperation and Development (OECD), Permanent Court of Arbitration, South Centre.

Special procedures of the Human Rights Council

Working Group on the issue of human rights and transnational corporations and other business enterprises, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes.

National human rights institutions

Commission Nationale des droits de l'homme et des libertés (Cameroon), European Network of National Human Rights Institutions, German Institute for Human Rights, Danish Institute for Human Rights, National Human Rights Council of the kingdom of Morocco.

Non-governmental organizations in consultative status with the Economic and Social Council

Al-Haq, ActionAid, American Bar Association, Amnesty International, Asia Pacific Forum on Women, Law and Development (APWLD), Associação Brasileira Interdisciplinar de AIDS (ABIA), Association for Women's Rights in Development (AWID), Catholic Agency

for Overseas Development (CAFOD), Center for Constitutional Rights, Center for International Environmental Law (CIEL), Centre de documentation, de recherché et d'information des peoples Autochtones (DOCIP), Centre Europe – Tiers Monde – Europe-Third World Centre (CETIM), Centre for Human Rights, Comité Catholique contre la Faim et pour le Développement (CCFD), Conectas Direitos Humanos, Congregation of Our Lady of Charity of the Good Shepherd, Conselho Indigenista Missionário (CIMI), Coopération Internationale pour le Développement et la Solidarité (CIDSE), Coordinadora Andina de Organizaciones Indígenas (CAOI), Corporate Accountability International (CAI), Development Alternatives with women for a new era, DKA Austria, Dominicans for justice and peace – order of preachers, FIAN International e.V., Franciscans International, Friends of the Earth International, Global Policy Forum, Indian Council of South America (CISA), Indian Movement "Tupaj Amaru," Indigenous Peoples' International Centre for Policy Research and Education (Tebtebba), Institute for Policy Studies (IPS), International Association of Democratic Lawyers (IADL), International Commission of Jurists, International Corporate Accountability Roundtable (ICAR), International Federation for Human Rights Leagues (FIDH), International Indian Treaty Council (IITC), International Institute of Sustainable Development, International-lawyers.org, International Organisation of Employers (IOE), International Trade Union Confederation, Iuventum e.V, Le Pont, MISEREOR, Public Services International (PSI), Réseau International des Droits Humains (RIDH), Social Service Agency of the Protestant Church in Germany, Swiss Catholic Lenten Fund, Tides Center, Verein Sudwind Entwicklungspolitik, Women's International League for Peace and Freedom (WILPF), World Federation of Trade Union (WFTU).

Annex II

List of panellists

Monday, 15 October 2018

Keynote speaker

- Dominique Potier, Member of the French National Assembly

Subject I – Articles 2 and 3 (15h–18h)

- Ibrahim Salama, Office of the United Nations High Commissioner for Human Rights
- Ana María Suárez Franco, Fian International
- Gabriela Quijano, Amnesty International
- Molly Scott Cato, Member of the European Parliament

Tuesday, 16 October 2018

Subject I – Articles 6, 7 and 13 (10h–13h)

- Lilián Galán, Member of the Parliament of Uruguay
- Nicolas Guerrero, Senior Legal Officer, WHO FCTC Secretariat
- Sam Zia-Zarifi, Secretary General, International Commission of Jurists
- Makbule Sahan, International Trade Union Confederation

Subject I – Article 9 (15h–18h)

- Elżbieta Karska, UN Working Group on Business and Human Rights
- Baskut Tuncak, UN SR on human rights and toxics
- Robert McCorquodale, Inclusive Law
- Gabriella Rigg Herzog, United States Council for International Business (USCIB)

Wednesday, 17 October 2018

Subject I – Articles 10, 11 and 12 (10h–13h)

- Surya Deva, UN Working Group on Business and Human Rights
- David Bilchitz, University of Johannesburg
- Richard Meeran, Leigh Day
- Maddalena Neglia, FIDH

Subject I – Articles 3 and 4 (15h–18h)

- David Bilchitz, University of Johannesburg
- Olivier De Schutter, Professor, University of Louvain
- Sandra Ratjen, Franscicans International
- Kinda Mohamadieh, South Centre

Thursday, 18 October 2018

Subject I – Article 5 (10h–13h)

- Olivier De Schutter, University of Louvain

- Richard Meeran, Leigh Day
- Lavanga Wijekoon, Littler

Subject I – Articles 1, 14 and 15 (15h–18h)

- Bradford Smith, OHCHR
- Layla Hughes, CIEL
- Carlos Lopez, ICJ

Friday, 19 October 2018

Subject II – The voices of the victims (selected cases from different sectors and regions) (10h–13h)

- Iván González, Trade Union Confederation of the Americas
- Tchenna Masso, MAB
- Wandisa Phama, University of Witwatersrand – CALS
- Ana María Suárez Franco, FIAN

Annex III

Summary of statements by panellists

First reading of the Draft LBI

A. Articles 2 and 8

1. The first panellist discussed two trends: the increasing recognition of the indivisibility of human rights, and the increasing protection in specialized areas. When such notions overlap, a beneficial impact occurs when there is allocation of resources and synergies with existing normative standards. These exist in the Draft LBI, and the enhanced protection of victims can be seen in the provisions on protection of victims and national implementation mechanisms.

2. The second panellist noted that, although article 8 is based on existing standards, it is important to include specific provisions on remedy and prevention. She underlined that victims often face obstacles when seeking access to justice, such as difficulties encountered when trying to prove a causal link between the acts of businesses within a supply chain and damage suffered. She welcomed the inclusion of certain provisions, such as those covering the right to collective action, the establishment of a victims' fund and those facilitating judicial remedy. Additionally, she suggested more clarity in certain articles, particularly 8 (2) and 8 (4).

3. The third panellist suggested that article 2 should give prevention a more prominent role, include corporate accountability, and seek to empower individuals and communities whose rights are at risk. The panellist noted that, given the purpose of prevention, article 8 should add protections for those who are at risk of becoming victims, such as human rights defenders, and cover issues such as procedural protections and injunctive relief. While article 8 recognizes the right to access to justice, she noted that it does not clearly oblige States to remove barriers to justice. Additionally, she suggested that several provisions be clarified, such as 8(3), in relation to which States are addressed, and article 8(4), with respect to the kind of information referred to.

4. The fourth panellist shared a story of a human rights defender who had been attacked and who was unable to stop abuses by a TNC through domestic laws. She argued that this demonstrates the need for creating an LBI to address the power imbalance between those seeking to vindicate rights and powerful companies. She called for an extension of the international rule-based system to address the consequences of globalization, and noted the collective responsibility for protecting everyone, no matter where they live.

B. Articles 6, 7 and 13

5. The first panellist emphasized the need for TNCs' obligations to be clearly enshrined in a future instrument. Regarding article 13, she noted two key issues: first, the adherence of domestic law with international law should be clearer, and second, the primacy of human rights over trade and investment treaties should be prominently stated. With respect to article 7, the panellist suggested including stronger language favouring victims' choice of law.

6. The second panellist encouraged the OEIGWG to take into consideration several provisions of the Framework Convention on Tobacco Control, and guidance interpreting those provisions. For instance, the OEIGWG could borrow language from Framework Convention article 5 (3) regarding preventing corporate capture. With respect to Draft LBI articles 13 (6) and 13 (7), the panellist queried how they relate to most favoured nation clauses, and pointed out that interpretation of trade and investment agreements are often done by dispute resolution mechanisms, not States.

7. The third panellist noted that article 6 is particularly useful and a good building block for the treaty, emphasizing that it should cover certain acts that are not part of the Rome

Statute of the International Criminal Court. He voiced some concern over article 7, noting that it may go too far and that the reference to "competent" courts was ambiguous. Concerning article 13, the panellist pointed out that the ending qualification in article 13 (2) could create a big loophole with respect to the treaty's application. Additionally, he suggested simplifying article 13, making it more explicit that international human rights law enjoys primacy over investment and trade agreements.

8. The fourth panellist found articles 6 and 7 generally helpful but suggested that certain language be clarified. With respect to article 13, she expressed two key concerns. First, the provisions relating to trade and investment could be made stronger: the primacy of human rights should be clearly stated and there should be a new provision requiring human rights language to be placed in trade and investment agreements. Second, she voiced concern that article 13(1), which reaffirms principles of sovereign equality and territorial integrity, could be used to justify restrictions of other parts of the instrument, in particular in relation to extraterritorial jurisdiction.

C. Article 9

9. The first panellist stressed the importance of including an article on prevention in the Draft LBI. States remain the main actor to protect human rights, and while non-binding instruments have provided guidelines for improving human rights protection, gaps remain in domestic systems (such as the lack of human rights safeguards and non-recognition of corporate criminal responsibility). This instrument has the potential to improve human rights due diligence systems on a large scale. She suggested that guidance could be sought from the 2018 report of the Working Group on Business and Human Rights to the General Assembly on human rights due diligence (A/73/163).

10. The second panellist emphasized the well-documented harm caused by companies' reckless handling of hazardous substances. In order to address this, he argued that States should compel companies to actively monitor and prevent violations. Mandatory human rights due diligence should go beyond what is in article 9 (2) and be transparent and traceable through the supply chain. Additionally, it should cover actual and potential exposure to toxic waste.

11. The third panellist agreed that article 9 is a crucial aspect of the Draft LBI and noted that the text should reference "human rights" due diligence so as to distinguish it from the due diligence conducted in business transactions. He suggested aligning the text better with that of the UNGPs and OECD guidelines, specifically with respect to the mitigation and tracking of impacts. The panellist warned against permitting exemptions in article 9(5) for small and medium-sized enterprises, as corporations would find a way to exploit this. Additionally, he advocated the inclusion of a defence for companies which took all precautions possible.

12. The fourth panellist did not support the Draft LBI or Optional Protocol and reaffirmed the business community's support for the UNGPs. In her view, article 9 unhelpfully departs from the UNGPs and adopts an unrealistic, outcome-based standard regarding due diligence. She emphasized that no business in the world – irrespective of its size – operates in a legal vacuum. States have the responsibility to pass laws that meet international standards and to enforce those laws for all companies in their jurisdiction. The first line of defence for rights abuses should be a strong and effective domestic rule of law.

D. Articles 10, 11 and 12

13. The first panellist recommended that any binding instrument should build on and complement the UNGPs. He noted that article 10 omits details on administrative penalties and preventive remedies, and suggested it might be useful to consider non-judicial mechanisms. He emphasized that the obligations in article 10 (1) should be limited to the territory or jurisdiction of the relevant States. Additionally, he expressed doubts over article 10 (4) since legal reforms would be needed to implement the provision, and questioned the restriction in article 10 (8) to "intentional" acts. With respect to article 11, he asked for greater

elaboration regarding provisions on the recognition and enforcement of judgments. Additionally, he suggested that the international cooperation in article 12 could include national human rights institutions and civil society.

14. The second panellist underscored the weakness of the State-based model that the Draft LBI adopted, arguing that it would be advisable to privilege a system of direct liability of corporations. He also noted the draft's failure to fully engage with corporate law, and suggested to recognize and address the notion of fiduciary duty in order to recognize the responsibility of natural persons, in particular directors of corporations.

15. The third panellist highlighted the importance of facilitating access to courts in the home states of TNCs since victims often do not have access to justice where abuses occur. While noting that article 10(6) covers many important situations, he suggested that the wording be made clearer. Additionally, he stressed the importance of removing practical obstacles victims face; thus, the inclusion of issues like access to information in article 8 (4) are crucial to the success of the treaty and should be read along with article 10.

16. The fourth panellist welcomed article 10 (4) on the reversal of the burden of proof, but criticized the qualification that it be subject to domestic law, suggesting its removal. While noting that article 10 (6) should be explicitly linked to article 9 on prevention, she suggested that liability not be limited to the failure to comply with due diligence. Additionally, the panellist argued that requiring "intentional" conduct to establish criminal liability was too high a threshold and suggested that the instrument include more elaboration on administrative penalties.

E. Articles 3 and 4

17. The first panellist noted the division regarding the scope of the Draft LBI. In his view, a victims-oriented approach requires that human rights violations are recognized and remedied regardless of the nature of activities of the perpetrator, be it a TNC or State. Further, he noted that most businesses are locally based, and if the focus is on the transnational character of activities, the LBI will be subject to loopholes. Thus, he proposed amending the scope so that transnational activity refers to "economic activity existing not solely for local purposes" and "taking place as a network of relationships that cross boundaries."

18. The second panellist noted the impossibility of distinguishing between TNCs and OBEs. While the LBI could focus on the transnational character of the activities, its definition in article 4 should be refined. First, it should not exclude State-owned enterprises. Second, it should clarify that the activities could be those of the corporation or of the subsidiaries with whom they have a contractual link.

19. The third panellist highlighted the need to strike a balance between addressing accountability gaps of TNCs and making sure that no new conditions for impunity are created in the LBI. She supported the broad approach of article 3(2) but suggested clarifying the meaning of "international human rights" to avoid divergent interpretations. In her view, adopting a minimum core of human rights approach would set a floor and allow States to establish greater protections.

20. The fourth panellist argued that the Draft LBI covers all entities regardless of their legal nature. Thus, domestic companies are covered so long as they have the capacity to commit human rights violations and their activities span two or more jurisdictions. She noted that no place in the Draft LBI excludes national companies; rather, article 9(5) even suggests they are covered as it references small and medium-sized enterprises, which include national companies.

F. Article 5

21. The first panellist suggested some textual revisions to the article, specifically removing references to "natural" persons and, potentially, "association of natural or legal persons." He noted that: (i) article 5 adds nothing beyond what is already authorized under international law, as it focuses on jurisdiction based on the principles of territoriality and active personality; (ii) it concerns adjudicative jurisdiction rather than prescriptive or

enforcement jurisdiction; (iii) the jurisdiction is to uphold international human rights rather promoting States' unique sovereign interests; (iv) the article establishes a duty to assert jurisdiction rather than merely permitting it; and (v) the formulation in article 5 (2) (c) is potentially too broad and vague.

22. The second panellist considered article 5 to be largely superfluous as it reflects existing rules of international law. He suggested that (i) the doctrine of *forum non conveniens* be prohibited; (ii) it should be clearer that courts in home States of TNCs should have jurisdiction over their subsidiaries; and (iii) article 5 (3) should be revised so as to make it easier to institute opt-out class action suits.

23. The third panellist considered the jurisdictional scope of the Draft LBI to be sweeping and overbroad as it permits claimants or activists to bring claims in home States against TNCs and their directors, owners, or even shareholders for actions abroad committed by entities with which TNCs may have had little or no relationship. It also allows plaintiffs to choose an applicable law outside of the forum jurisdiction and provides for universal jurisdiction. According to his view, this approach likely violates international law and principles, threatens State sovereignty, and could increase the risks of legal liability which could lead to a decrease in investments.

G. Articles 1, 14 and 15

24. The first panellist suggested that article 14 clarify whether Committee members can be re-elected, require supplementary reports every five years instead of four, and align the Committee's functions with those from other human rights treaties. Regarding article 15, he proposed specific revisions to the language concerning regional integration organizations and suggested having a low threshold for entry into force. He also proposed a number of revisions to the format of the Draft LBI, including taking the preamble out of the operative section of the LBI and splitting articles 14 and 15 into several articles.

25. The second panellist proposed that a gender-based perspective be adopted throughout the treaty. Emphasizing the special risks women face, she proposed revising article 1 so that it acknowledges gender equality as a fundamental right. Additionally, she suggested revising article 14 so that a gender balance be "achieved" in the Committee. She also noted that article 15 contains crucial provisions that need to be fleshed out in other articles; for example, article 15 (4) should have a corresponding obligation in article 9.

26. The third panellist suggested enhancing the provisions on the Committee, for instance by including provisions prohibiting conflicts of interest for Committee members and for ensuring the participation of civil society and UN agencies. He proposed that the functions of the Conference of States Parties be clarified and expanded. Additionally, he suggested including a provision to cover dispute resolution between States regarding the interpretation and application of the instrument.

Panel on "The voices of victims"

27. Four panellists introduced the session by discussing specific incidents of abuses by companies and noting attacks on the freedom of assembly, environmental crimes, land grabbing, and the disproportionate impact of business-related harm on women. They argued that accountability has been elusive (including throughout supply chains) and voluntary mechanisms have not sufficiently addressed these harms; thus, it was imperative to have an LBI that focuses on the need for effective remedy. Some suggested that the Draft LBI include more language on human rights defenders; free, prior and informed consent; precautionary measures; and accountability throughout entire supply chains.